UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 559

Cases No. 583: VITKOVSKI
No. 585: RYLKOV

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Hubert Thierry;

Whereas, on 15 February 1991, Vladislav Vitkovski, a former staff member of the United Nations, filed an application containing pleas that read in part as follows:

"II. Pleas

7. The Applicant respectfully requests the Tribunal to:

(a) rescind a negative administrative decision not to extend his appointment and/or convert it to a career appointment conveyed to the Applicant in a memorandum from [the] Deputy Executive Officer, Department of Conference Services, dated 7 August 1990;

(b) order the reinstatement of the Applicant as a staff member of the United Nations retroactively from 16 September 1990 or, in the event of compensation being paid in lieu of reappointment, to fix the award in the amount equivalent to three years net base salary in view of the special circumstances of the case;

(c) direct the Respondent to pay to the Applicant the amount of salary lost after 16 September 1990.

8. In that connection, the Applicant requests the Tribunal to recognize:

(a) that the decision of the Respondent no to offer him a career appointment was illegal because the Applicant was not given consideration for such an appointment, to which he is entitled in accordance with General Assembly resolution 41/213 of 19 December 1986, ...;

(b) that the above decision of the Respondent was also taken in contravention of the guidelines issued by the Office of Human Resources Management with regard to the contractual status of Eastern European nationals, as well as that of staff members recruited through national competitive examinations;

(c) that the decision of the Respondent not to extend the Applicant's fixed-term contract was illegal because:

(i) this decision constitutes a breach of contract accepted by the Applicant on entering the United Nations Language Training Course in Moscow which is entitled 'Agreement for Students' and contains specific provisions that create a legal expectancy of employment with the United Nations for a minimum period of five years;

(ii) ... [the] denial of fair and equitable consideration for ... a renewal or conversion [to a career appointment] in the circumstances described in sub-paragraph (i) above and against the background of good service of a staff member. ... constitutes a violation of Article 101.3 of the Charter and staff regulation 4.2, ...;

(iii) this decision constituted illegal discrimination against the Applicant vis-à-vis other employees of the Russian Translation Service with similar qualifications and experience;

(d) that the above mentioned decisions of the Respondent were arbitrary, based on considerations extraneous to the interests of the Organization, as well as to functional needs of the Russian Translation Service;

(e) that the right of the Applicant to fair treatment on the part of the Administration was abrogated by the latter on several occasions;

(f) that the Administration also failed to comply with staff regulation 4.4 ...;

(g) that the Applicant's status in the Organization was not a 'secondment' within the meaning of staff rule 104.12(b), and the criteria of secondment as clarified by the Tribunal in its Judgement No. 482;

(h) that the Administration has not acted in the Applicant's case with the prudence, care and attention which are to be expected of an international organization with regard to personnel issues."

Whereas, on 15 February 1991, Victor Rylkov, a former staff member of the United Nations, filed an application containing pleas that read in part as follows:

"III. Pleas

8. The Applicant respectfully requests the Tribunal to:

(a) rescind the Respondent's decision of 16 July 1990 not to extend his current appointment and/or convert it to a career appointment;

(b) direct the Respondent to reinstate him as a United Nations staff member retroactively or, in lieu of the reinstatement, to pay him a compensation in the amount equal to a 3-year net base salary from the expiration of his contract in view of the special circumstances of the case;

(c) order the Respondent to pay the Applicant his salary lost during the period of unemployment between the expiration of his contract and reinstatement in the Organization.

9. In this connection the Applicant requests the Tribunal to recognize:

(a) that the decision of the Respondent not to offer him a career appointment was illegal because the Applicant was not given consideration for such an appointment to which he is entitled in accordance with the General Assembly resolution 41/213 of 19 December 1986, by which the Assembly approved the recommendations of the Group of High-Level Intergovernmental Experts to Review the Efficiency of the

Administrative and Financial Functioning of the United Nations, including its Recommendation 45 which provides that staff members should be eligible for permanent appointments after having served three years in the United Nations. There as therefore a lack of due process on the part of the Respondent as regards the Applicant's contractual status throughout the latest period of his employment in the United Nations;

(b) that the above decision of the Respondent was also taken in contravention of the guidelines issued by the Office of Human Resources Management with regard to the contractual status of staff members who are Eastern European nationals, as well as those recruited through national competitive examinations;

(c) that the decision of the Respondent not to extend the Applicant's fixed-term contract was illegal because:

(i) this decision constituted a breach of contract as accepted by the Applicant on entering the United Nations Language Training Course in Moscow which is entitled 'Agreement for Students' and contains specific provisions that create a legal expectancy of employment with the United Nations for a minimum period of five years;

(ii) ... [the] denial of reasonable consideration for ... a renewal or conversion [to a career appointment] in the circumstances described in sub-paragraph (i) above and against a background of satisfactory service of a staff member. ... constitutes a violation of Article 101.3 of the Charter and staff regulation 4.2, ...;

(iii) this decision constituted illegal discrimination against the Applicant vis-à-vis other staff members in the Russian Translation Service with similar qualifications and experience;

(d) that the above mentioned decisions of the Respondent were arbitrary, based on considerations extraneous to the interests of the Organization, as well as to functional needs of the Russian Translation Service;

(e) that the right of the Applicant to a fair treatment on the part of the Respondent was abrogated by the latter on several occasions;

(f) that the Respondent also failed to comply with staff regulation 4.4 which requires that 'the fullest regard should be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations';

(g) that the Applicant's status in the Organization was not a 'secondment' within the meaning of staff rule 104.12(b), and the criteria of secondment as clarified by the Tribunal in its Judgement No. 482;

(h) that the Respondent has not acted in the Applicant's case with the prudence, care and attention which are to be expected of an international organization with regard to personnel questions."

Whereas the Respondent filed his answer to the Vitkovski application on 15 May 1991 and to the Rylkov application on 21 June 1991;

Whereas, on 31 July 1991, the Applicant Vitkovski filed written observations on the Respondent's answer, submitted a further explanatory statement and amended pleas (largely duplicating or paraphrasing his original pleas) that read in part as follows:

"I. AMENDED PLEAS

1. The Applicant respectfully requests the Administrative Tribunal:

A. With respect to production of relevant documents

(1) To direct the Respondent to produce:

(a) certified true copies of each of the documents requested under the pleas in his application,

(b) certified true copy of any relevant document, prepared by the Office of Legal Affairs, on the request of OHRM [Office of Human Resources Management], on the status of the Applicant's alleged 'Secondment' from the USSR Government.

...

(15) To order the Respondent, pursuant to article 9 of its Statute:

(a) To rescind his decision of 17 August 1990 and his subsequent decision of 28 March 1991 not to renew the Applicant's fixed-term appointment beyond 16 September 1990 or to grant him a career appointment effective from 17 September 1990.

(b) To reinstate the Applicant in his post in RTS [Russian Translation Services] retroactive from 17 September 1990 in accordance with the provisions of staff rule 104.3(b), and to pay him back salary and allowances retroactive from 17 September 1990.

(c) To pay, on his behalf and on behalf of the Organization, appropriate contributions to the United Nations Joint Staff Pension Fund covering the period from 17 September 1990 until his reinstatement in RTS.

(d) To issue the Applicant replacement Letters of Appointment covering the fixed-term appointments for the period of 17 September 1986 to 16 September 1990, omitting the special condition stipulated therein that he was on 'Secondment' from the USSR Government.

(16) To award the Applicant appropriate and adequate compensation for the material and moral injuries suffered by him as a consequence of the unreasonable delays in his appeal procedures, causing thereby a 'denial of justice' in his case.

(17) To determine the Applicant's case as an exceptional one and to fix the compensation to be paid to him at three years net base salary as at the date of his separation from the service, if the Secretary-General decides, within 30 days of the notification of the judgement, in the interest of the United Nations, not to reinstate and grant the Applicant a career appointment, retroactive from 17 September 1990.

(18) To hold oral proceedings in order to hear the testimonies of the Applicant and of the following witnesses:

..."

Whereas, on 23 August 1991, the Applicant Rylkov filed written observations on the Respondent's answer, submitted a further explanatory statement and amended pleas (largely duplicating or paraphrasing his original pleas) that read in part as follows:

"I. AMENDED PLEAS

1. The Applicant respectfully requests the Administrative Tribunal:

A. With respect to production of relevant documents

(1) To direct the Respondent to produce:

(a) Certified true copies of each of the documents requested under paragraph 7 of his application;

(b) A certified true copy of the relevant document, prepared by the Office of Legal Affairs, on the request of the Office of Human Resources Management (OHRM), on the status of the Applicant's alleged 'Secondment' from the USSR Government;

...

(19) To order the Respondent, pursuant to article 9 of its Statute:

(a) To rescind the decision of 16 July 1990 taken, on his behalf, by the DCS [Department of Conference Services] Administration and his subsequent decision of 10 June 1991 not to renew the Applicant's fixed-term appointment beyond 20 October 1990, or to grant him a career appointment effective from 21 October 1990.

(b) To reinstate the Applicant in his previous post in the RTS [Russian Translation Services] retroactive from 21 October 1990 in accordance with the provisions of staff rule 104.3(b), and to pay him his back salary and allowances retroactive from 21 October 1990 until his reinstatement in the RTS.

(c) To pay, on his behalf and on behalf of the Organization, appropriate contributions to the United Nations Joint Staff Pension Fund, covering the period from 21 October 1990 until his reinstatement in the RTS.

(d) To issue the Applicant replacement Letters of Appointment covering the fixed-term appointments for the period of 21 October 1986 to 20 October 1990, omitting the special condition stipulated therein that he was on 'Secondment' from the USSR Government.

(20) To award the Applicant appropriate and adequate compensation for the material and moral injuries suffered by him as a consequence of the continuing humiliations, anxieties and uncertainties felt by him following his forced separation from the RTS as of 20 October 1990, causing thereby great pain and suffering for himself and for his family.

(21) To award the Applicant appropriate and adequate compensation for the material and moral injuries suffered by him as a consequence of the unreasonable delays in his appeal procedures, causing thereby a 'denial of justice' in his case.

(22) To determine the Applicant's case as an exceptional one, and to fix the compensation to be paid to him at three years net base salary as at the date of his separation from the service, if the Secretary-General decides, within 30 days of the notification of the judgement, in the interest of the United Nations, not to reinstate and grant the Applicant a career appointment in the Organization retroactive from 21 October 1990.

(23) To hold oral proceedings in order to hear the testimonies of the Applicant and of the following witnesses:

..."

Whereas at the request of the Tribunal, on 31 January 1992, the Respondent submitted his comments on the amended pleas of the Applicants Rylkov and Vitkovski;

Whereas, on 15 May 1992, the President of the Tribunal ruled that no oral proceedings would be held in the cases;

Whereas, on 21 May 1992, the Applicants submitted an additional statement and on 28 May 1992, the Respondent provided an answer thereto;

Whereas, on 11 June 1992, the Tribunal put questions to the Respondent and requested the production of additional documents, which the Respondent provided on 12 and 16 June 1992;

Whereas the facts in the cases are as follows:

The Applicants, Victor Rylkov and Vladislav Vitkovski, nationals of the former Union of Soviet Socialist Republics, graduated from the United Nations Language Training Course of the Moscow State Pedagogical Institute of Foreign Languages and passed the 1986 United Nations language examination for recruitment of Russian language staff.

The Applicant Rylkov entered the service of the United Nations on 21 October 1986, as an Associate Translator in the Russian Translation Service of the Department of Conference Services (DCS). He was initially offered a one-year fixed-term appointment at the P-2, step III level. His Letter of Appointment stated, as a special condition, that the Applicant was "on secondment from the USSR Government". The Applicant's appointment was extended once, for a further fixed-term period of three years, through 20 October 1990. The second Letter of Appointment also stated as a special condition that the Applicant was "on secondment from the USSR Government".

The Applicant Vitkovski entered the service of the United Nations on 17 September 1986, as an Associate Translator in the Russian Translation Service. He was initially offered a one-year fixed-term appointment at the P-2, step I level. His Letter of Appointment stated, as a special condition, that the Applicant was "on secondment from the USSR Government". The Applicant's appointment was extended once, for a further fixed-term period of three years, through 16 September 1990. The second Letter of Appointment also stated as a special condition that the Applicant was "on secondment from the USSR Government."

During the course of the Applicant Rylkov's employment with the United Nations, his performance was evaluated in three performance evaluation reports. In a first report, evaluating his performance from 21 October 1986 through 30 June 1987, the Applicant received five "C"s (Good) and nine "B"s (Very Good). His overall performance was rated as a "good performance". In a second report, evaluating his performance from 1 July 1987 through 30 June 1988, the Applicant received four "C"s (Good), nine "B"s (Very Good) and one "A" (Excellent). His overall performance was rated as a "very good performance". Following this second evaluation and in accordance with the provisions of PD/9/59, DCS recommended that the Applicant Rylkov be promoted

to the P-3 level. His promotion was implemented with effect from 1 October 1988. In a third report, evaluating his performance from 1 July 1988 through 30 June 1990, the Applicant received one "D" (Fair), five "C"s (Good), six "B"s (Very Good) and one "A" (Excellent). His overall performance was rated as a "good performance".

During the course of the Applicant Vitkovski's employment with the United Nations, his performance was evaluated in three performance evaluation reports. In a first report, evaluating his performance from 17 September 1986 through 30 June 1987, the Applicant received five "C"s (Good), eight "B"s (Very Good) and one "A" (Excellent). His overall performance was rated as a "very good performance". In a second report, evaluating his performance from 1 July 1987 through 31 October 1988, the Applicant received seven "C"s (Good), six "B"s (Very Good) and one "A" (Excellent). His overall performance was rated as a "good performance". Following this evaluation, DCS did not recommend the Applicant Vitkovski's promotion to the P-3 level in accordance with the provisions of PD/9/59 and advised that he "should be given some more time to prove himself as a full-fledged translator." In a third report, evaluating his performance from 1 November 1988 through 31 August 1989, the Applicant received two "C"s (Good), nine "B"s (Very Good) and two "A"s (Excellent). His overall performance was rated as a "good performance". The Applicant was then promoted to the P-3 level, with effect from 1 September 1989.

On 25 May 1990, the Administrative Tribunal rendered its Judgement No. 482, in the Qiu, Zhou and Yao cases, which caused the Secretary-General to review the Organization's secondment procedures. On 18 October 1990, the Secretary-General submitted a report to the General Assembly on secondment from government service (A/C.5/45/12), which interpreted the Tribunal's Judgement No. 482 to mean "that many staff members on fixed-term contracts, formerly thought to be on secondment, would in fact not be in that status, because the arrangements do not comply with the criteria as clarified by the Tribunal. Such persons would instead be ... subject to the standard principles of renewal or non-renewal as set out in the Staff Regulations and Rules". On 15 November 1990, the Assistant Secretary-General for Human Resources Management (OHRM) authorized the establishment of a Joint DCS/OHRM Working Group for the Review of the Contractual Status of Staff Members "on secondment" (Joint Review Group).

In the meantime, on 28 June 1990, about four months prior to the expiration of the Applicant Rylkov's fixed-term appointment, he wrote to the Deputy Executive Officer of DCS asking for an extension of his appointment and/or its conversion to a career appointment. In a reply dated 16 July 1990, the Deputy Executive Officer, DCS, informed the Applicant Rylkov that his appointment would not be extended. He stated inter alia:

> "...
>
> 2. In considering your request, due note has been taken of the fact that you have served the Organization on a fixed-term appointment for four years and that your contract is due to expire on 20 October 1990.
>
> 3. We note that a fixed-term appointment expires automatically upon the date therein specified in conformity with staff rule 104.12(b), which provides that a fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment. As a result, you will separate from service on 20 October 1990. My Office will be in touch with you for the purpose of regulating the separation formalities."

On 1 August 1990, the Applicant Rylkov requested the Secretary-General to review the administrative decision not to extend his appointment. In a reply dated 7 August 1990, the Chief, Administrative Review Unit, informed the Applicant that administrative review of the decision would be conducted and that if he did not receive an answer from the Secretary-General within one month, he could file an appeal with the Joint Appeals Board.

On 13 August 1990, about a month prior to the expiration of the Applicant Vitkovski's fixed-term appointment, he wrote to the Deputy Executive Officer of DCS asking for an extension of his appointment and/or its conversion to a career appointment. In a reply dated 17 August 1990, the Executive Officer, DCS, informed the Applicant Vitkovski that his appointment would not be extended. He stated inter alia:

> "...
>
> 2. In considering your request, due note has been taken of the fact that you have served the Organization on a fixed-term appointment for four years and that your contract is due to expire on 16 September 1990.

> 3. We note that a fixed-term appointment expires automatically upon the date therein specified in conformity with staff rule 104.12(b), which provides that a fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment. As a result, you will separate from service on 16 September 1990. My Office will be in touch with you for the purpose of regulating the separation formalities."

On 22 August 1990, the Applicant Vitkovski requested the Secretary-General to review the administrative decision not to extend his appointment. In a reply dated 27 August 1990, the Chief, Administrative Review Unit, informed the Applicant that administrative review of the decision would be conducted and that if he did not receive an answer from the Secretary-General within one month, he could file an appeal with the Joint Appeals Board.

On 27 August 1990, the Applicant Rylkov wrote to the Secretary-General, requesting an extension of his appointment for the duration of the forty-fifth session of the General Assembly. On 5 September 1990, the Applicant Rylkov and another colleague met with the Chief of the Russian Translation Service who, they assert, informed them that he would not recommend an extension of their appointments. On the same date, they wrote a letter to the Chief of the Russian Translation Service in which they qualified his "actions with regard to [their] contractual status to be a flagrant example of groundless discrimination against [them] vis-à-vis other employees of the Russian Translation Service" and constituting "a gross infringement of [their] human rights as well as [their] rights as staff members of the United Nations Secretariat." On 9 September 1990, the Applicant Rylkov wrote to the Secretary-General requesting review of the administrative decision by the Chief, Russian Translation Service, not to recommend him for an extension through the forty-fifth session of the General Assembly.

On 24 September 1990, the Applicant Rylkov asked the Panel on Discrimination and Other Grievances (Panel on Discrimination) to investigate his case.

On 2 October 1990, the Applicants Rylkov and Vitkovski sought the Secretary-General's agreement for submission of their appeals directly to the Administrative Tribunal.

In a memorandum dated 15 October 1990, the Coordinator of the Panel on Discrimination informed the Assistant Secretary-General for Human Resources Management of the results of their investigation in the Rylkov case and recommended, in the light of the "similarity of [the Applicant Rylkov's] case with those that were dealt with in Administrative Tribunal Judgement No. 482..." that:

> "(a) the fixed-term appointment of [the Applicant] be extended for a period of two months as of the day of its expiration, with no interruption in service, in accordance with paragraph 15 of ST/AI/308/Rev.1; and
>
> (b) OHRM endeavor to act promptly upon this recommendation, particularly as the staff member's present contract is due to expire on 20 October 1990".

In a reply dated 18 October 1990, the Assistant Secretary-General, OHRM, informed the Coordinator of the Panel on Discrimination that he would not recommend an extension of the Applicant Rylkov's appointment beyond 20 October 1990.

In the meantime, on 15 October 1990, the Applicant Rylkov instituted a rebuttal to his most recent performance evaluation report, pursuant to administrative instruction ST/AI/240/Rev.2. In his letter to the Personnel Officer instituting the rebuttal, the Applicant Rylkov argued that the contents of the report had been "most seriously affected by factors and considerations extraneous to the interests of the Organization...".

On 5 December 1990, the Assistant Secretary-General, OHRM, informed the Applicants Rylkov and Vitkovski that, while the Secretary-General did not object to submission of their appeals directly the the Administrative Tribunal, the decisions they were appealing were in the process of being reviewed.

On 15 February 1991, the Applicants Rylkov and Vitkovski filed with the Tribunal the applications referred to earlier.

On 28 February 1991, the Panel constituted to evaluate the Applicant Rylkov's rebuttal recommended a number of upgradings in his performance report. Also, under a heading "general observations" the members of the Panel stated:

> "The rebuttal panel believes that this PER [performance evaluation report] cannot be fairly considered in strict isolation, without regard to developments in the area of career possibilities for staff members of USSR nationality, the actions taken in that regard by Mr. Rylkov and others in the Russian Translation Service and the resulting change of atmosphere in that Service, which was variously described to the panel as 'tense', 'threatening', 'unclear' and 'potentially explosive', one of 'revenge', 'anxiety' or 'waiting'. Only one interviewee described it as 'improved' and 'less helpless'. Considering that Mr. Rylkov was under great stress during the last quarter of the reporting period, his performance could be considered remarkably good."

On 1 March 1991, the Under-Secretary-General for Conference Services and Special Assignments, having considered the Rebuttal Panel's report, decided to amend the Applicant Rylkov's performance evaluation report by changing four ratings and one comment so that the Applicant received four "C"s, eight "B"s and one "A" and the overall rating of a "very good performance".

In a letter dated 28 March 1991, the Assistant Secretary-General, OHRM, informed the Applicant Vitkovski that the Joint Review Group he had established to examine the contractual status of current DCS language staff had reviewed his case and concluded that he should not be reappointed to United Nations service. The Secretary-General had accepted this recommendation.

On 10 June 1991, the Assistant Secretary-General, OHRM, notified the Applicant Rylkov that the Joint Review Group he had established to examine the contractual status of current DCS language staff had reviewed his case and concluded that he should not be reappointed to United Nations service. The Secretary-General had accepted this recommendation.

Whereas the Applicants' principal contentions are:

1. In deciding whether to extend the Applicants' appointments, the Respondent sought the views of the Government of the former USSR. His decision was thus vitiated by considerations contrary to the interests of the United Nations and incompatible with Article 100 of the Charter.

2. The contractual status of the Applicants was not a true secondment in accordance with the holding in the Tribunal's Judgement No. 482, Qiu, Zhou and Yao and therefore their Government's view should not have been sought.

3. The Applicants' criticism of the illegal practice of secondment and the former USSR Government's reaction thereto led the Respondent not to offer them further appointments.

4. The Applicants, having passed a national competitive examination, were entitled, under PD/9/59, as well as under General Assembly resolution 41/213, to career appointments after three years of service.

5. The Chief of the Russian Translation Service discriminated against the Applicant Rylkov in the evaluation of his performance and omitted to prepare a performance report for the Applicant Vitkovksi.

6. There were deficiencies in the procedures adopted by the Joint Review Group.

Whereas the Respondent's principal contentions are:

1. The Applicants' cases were given proper consideration by the Joint Review Group. The decision not to reappoint the Applicants was fair and objective and fully respected their rights under the Staff Regulations and Rules and applicable General Assembly resolutions.

2. The Applicants had no legal expectancy of a minimum period of service of at least five years.

3. The Applicants were not entitled to permanent appointments.

The Tribunal, having deliberated from 9 to 30 June 1992, now pronounces the following judgement:

I. The Applicants have requested joinder of their applications. The Tribunal finds that it would be appropriate to consider these applications together since they involve common questions. The applications are therefore joined.

II. By letter dated 18 June 1990, the Applicant Rylkov requested an extension of his fixed-term contract which was due to expire on 20 October 1990 and/or its conversion to a career appointment. This was denied by a letter to the Applicant dated 16 July 1990. The latter advised the Applicant that due note had been taken of his four years service, that his fixed-term appointment carried no expectancy of renewal or conversion under staff rule 104.12(b) and that his appointment would expire automatically on 20 October 1990. By letter dated 1 August 1990, the Applicant requested review of this decision and by letter dated 27 August 1990, the Applicant requested a temporary extension of his appointment at least through the duration of the 45th session of the General Assembly without prejudice to his earlier request, but this was rejected.

By memorandum dated 15 October 1990, in response to a broad charge of discrimination by the Applicant against his superiors in the Department of Conference Services dated 24 September 1990, the Coordinator of the Panel on Discrimination and Other Grievances (Panel on Discrimination) found "that a deviation from the applicable rules and regular existing procedures has occurred and that there were sufficient grounds to give it cause to believe that, on a prima facie basis, the [Applicant] has been subjected to unfair treatment in being denied a further appointment." He requested, as an interim measure, that the Assistant Secretary-General for Human Resources Management (OHRM), extend the Applicant's fixed-term appointment for two months as of the date of its expiration. The request was rejected by the Assistant Secretary-General, OHRM, in a memorandum to the Co-ordinator of the Panel on Discrimination dated 18 October 1990.

On 10 June 1991, the Applicant was informed that the decision dated 16 July 1990, would be maintained on the basis of a recommendation to the Respondent by the Joint Review Group, a body designated by the Respondent to consider the cases of certain staff members holding fixed-term "secondment" appointments. The creation of the Joint Review Group and the responsibilities entrusted to it were intended to assist the Respondent in carrying out his duties in keeping with the principles enunciated by the Tribunal in Judgement No. 482, Qiu, Zhou and Yao (1990). The Applicant now challenges the decisions dated 16 July 1990 and 10 June 1991. The Respondent has consented to direct appeal to the Tribunal.

III. By letter dated 13 August 1990, the Applicant Vitkovski requested consideration for an extension of his then current fixed-term appointment, and/or its conversion to a career appointment. This was denied by a letter to the Applicant dated 17 August 1990, which advised him that due note had been taken of his four years of service, but that his fixed-term appointment carried no expectancy of renewal or conversion under staff rule 104.12(b) and that his appointment would expire automatically on 16 September 1990. The Applicant requested review of this decision. On 28 March 1991, the Applicant was informed that the earlier decision would be maintained on the basis of a recommendation to the Respondent by the Joint Review Group. The Applicant now challenges the decisions by the Respondent dated 17 August 1990 and 28 March 1991. The Respondent has consented to direct appeal to the Tribunal.

IV. The Tribunal notes that consent in these cases was given, despite the presence of substantial disputed factual issues, and that in such cases, the Respondent ordinarily prefers to have the benefit of a review by the Joint Appeals Board.

V. In considering the various arguments advanced by the Applicants, and taking into account the Respondent's answer to a request for documents relating to possible communications between the Applicants' Government and the Organization, the Tribunal does not have to decide whether or not valid secondments were present. The Respondent does not defend the decisions under attack on the ground that he was compelled by the existence of a secondment arrangement to take the actions being challenged. It is only the Applicants who contend that the underlying reason for the decisions challenged was that they were viewed by the Respondent as if they were on secondment.

VI. The Applicants argue that an "Agreement for Students" dated 20 September 1985, signed by them, constituted bilateral contracts binding them and the Organization to minimum five-year fixed-term appointments. Since the Applicants' appointments were not renewed for a fifth year - the periods from 17 September 1990 to 16 September 1991, and 21 October 1990 to 20 October 1991, respectively - the Applicants allege that the Organization violated its contracts with them and that appropriate remedies should follow. The Tribunal

is unable to agree with the Applicants on this point. To begin with, the Tribunal does not consider the document entitled "Agreement for Students", signed by the Applicants, to be a bilateral agreement binding in the same fashion on both the Applicants and the Organization to a five-year fixed-term appointment.

VII. The paragraph of the "Agreement for Students" on which the Applicants rely provides:

> "4. You will agree to accept such appointment, subject to the United Nations Staff Regulations and Rules, for a minimum period of five years, and to perform duties of an interpreter trainee, translator trainee, possibly editor trainee, interpreter or translator, at the Headquarters of the United Nations or at any of its offices to which you may be assigned."

In the Tribunal's view, this provision only binds the students, who commit themselves to accept appointment by the United Nations for up to five years, if offered, but it does not require the United Nations to keep the students in its employ for any specific period, much less guarantee that the Applicants would be appointed for a minimum period of five years. Moreover, when the Applicants first accepted their fixed-term appointments and signed the document presented to them by the Organization which constituted their contracts, the term was for a one-year period. Again, when the Applicants signed the document presented to them by the Organization for their second fixed-term appointments, it was for three years. This was tantamount to recognition by the Applicants that they had not been guaranteed a contract for a five-year period. If they ever entertained any contrary thoughts, they should have made them known at the time. Instead, they waived any such claim by signing the two fixed-term agreements. Finally, the Tribunal notes untimeliness with regard to the Applicants' claims related to the "Agreement for Students". It appears to the Tribunal that any such claims should have been asserted at the time of presentation to the Applicants of their first fixed-term appointments or at the very latest upon presentation to them of their second fixed-term appointments.

VIII. The Applicants ask the Tribunal to determine that, since they had never been officials of any agency of the former Government of the USSR and never signed any tripartite agreement between them, the United Nations and the former Government of the USSR, the Respondent unlawfully included a special condition in their Letters of Appointment that they were on "secondment" from the former Government of the USSR. For the reasons noted above, the Tribunal sees no useful purpose to be served by entering into that subject.

IX. The Applicants ask that the Tribunal determine that, under Section I of Personnel Directive PD/9/59 dated 4 March 1959, as amended, the Applicants were entitled to permanent appointments, with promotion to the P-3 level, on completion of two years of satisfactory service, but that the Respondent failed to consider them for, or to grant them permanent appointments, and thereby violated their rights under PD/9/59. The Tribunal notes that the Applicants' contentions with regard to PD/9/59 did not appear, as such, in their applications but instead surfaced for the first time in their amended pleas and explanatory statement, which accompanied their written observations. However, a similar point was made by the Applicants in their applications in connection with a communication dated 27 March 1989, from the Assistant Secretary-General for Human Resources Management to Heads of Departments and Offices in which it was stated:

> "...
>
> Staff members who joined the Organization through previous national competitive examinations and who have already served for two years on fixed-term appointments should, subject to satisfactory performance, be granted permanent appointments directly, omitting the probationary appointment stage altogether."

X. At the time when the Applicants completed two years of satisfactory service, it was, rightly or wrongly, the practice of the Administration not to apply either PD/9/59 or the similar policy described in the passage quoted above to staff members, such as the Applicants in the Russian Language Service. This practice resulted from the system of rotation followed in that service with respect to graduates of the Moscow State Pedagogical Institute of Foreign Languages. Had the Applicants wished to challenge the validity of

that practice, because they considered that they were deserving of permanent appointments in 1988, or perhaps even in 1989, it was open to them to do so in a timely fashion, as did the Applicants involved in Judgement No. 482 with respect to the identical practice that was applied to them, notwithstanding rights they were asserting to permanent appointments under General Assembly resolution 37/126. However, the Applicants in the present case did not do so. They waited until 1990, before raising the issue. Under the Tribunal's jurisprudence, they may not now contend that the failure to grant them permanent appointments that they allegedly should have received in 1988, or even in 1989, violates their rights under PD/9/59 or the communication dated 27 March 1989, referred to above. (Cf. Judgement No. 527, Han (1991); Judgement No. 549, Renninger (1992)). To hold otherwise would have the effect of reviving countless untimely claims and would unjustly subject the Organization to administrative turmoil. Accordingly, the Tribunal will not entertain such claims in this proceeding. What is properly before the Tribunal are the decisions with respect to the Applicants' requests for extension of their fixed-term appointments and/or conversion to career appointments.

XI. The Applicants then ask that the Tribunal determine that, notwithstanding the provisions of staff rule 104.12(b), they nevertheless had a legal expectancy of renewal of their fixed-term appointments beyond their expiration dates. The Tribunal declines to so hold. The Tribunal's jurisprudence dealing with a legal expectancy to renewal of a fixed-term appointment has made it clear that such an expectancy may be found only in exceptional circumstances. When the Tribunal has found such exceptional circumstances, this was tantamount to finding that the Applicant was legally entitled to a further contract and that failure to tender such a contract engaged the responsibility of the Organization.

XII. The Tribunal does not consider that the facts in this case warrant a determination that a legal expectancy existed without reference to the events associated with the Respondent's decision after Judgement No. 482, to reconsider persons such as the Applicants for extensions of their employment

with the Organization. The fundamental issue in these cases, in the Tribunal's view, is whether, the Respondent, in considering the Applicants' requests for further employment by the Organization on the basis of the objective criteria recommended by the Joint Review Group, instead of relying exclusively on staff rule 104.12(b), did so in a proper manner. Nothing in the circumstances of these cases persuades the Tribunal that even before such discretionary consideration by the Respondent, the Applicants were automatically entitled to extensions of their employment with the Organization, i.e., that there was a pre-existing legal expectancy. Thus, for example, contrary to the Applicants' assertions, the Tribunal does not consider that the Applicants' performance evaluation reports alone, or staff regulation 4.4, or General Assembly resolution 41/213 dated 19 December 1986, as it related to the eligibility of staff members for permanent appointments after having served three years, created a legal expectancy.

XIII. The central issue in these cases is whether the structure created by the Respondent to examine the facts and make impartial and objective recommendations with respect to extension of employment by persons in the position of the Applicants provided them with the elements of due process and fair procedure, so as to assure them of reasonable objective consideration in that regard, or whether the recommendations were flawed by extraneous considerations, unfairness or other improper factors. At the outset, the Tribunal wishes to recognize the administrative and operational complexities faced by the Secretary-General as a result of Judgement No. 482, and considers that the steps taken by the Secretary-General, including formation of the Joint Review Group to assist him with respect to certain aspects of these matters, reflected a good faith effort on his part to observe the principles set forth in Judgement No. 482.

XIV. Unfortunately, however, the Tribunal is unable to find in the present cases that the Joint Review Group machinery established by the Secretary-General functioned as intended, perhaps because it did not parallel the structure and procedures of such joint bodies as the Joint Appeals Board or the Appointment and Promotion Board. In the Applicants' cases, the role of

the Applicants' Department, and in particular that of the Chief of the Russian Translation Service, in connection with the Joint Review Group's discharge of its mandate, coupled with the procedures followed by the Group, seriously infringed the Applicants' rights to receive fair consideration under the criteria established by the Secretary-General.

XV. To begin with, the Tribunal considers that substantial evidence - as distinct from mere allegations - was presented by the Applicants in support of their contentions that the Chief of the Russian Translation Service, the official to whom they reported, was improperly motivated by extraneous factors in his attitude towards them and in his actions with respect to their careers. The Applicants also assert that, in his actions, the Chief of the Russian Translation Service was following the directions of officials of his Government in a manner totally incompatible with his duties. If that were established, it would have constituted a very serious violation of his obligations. Any international civil servant who acts in a manner so squarely in conflict with the Charter would doubtless be subject to possible summary dismissal.

XVI. Specifically, the Applicants claim that the Chief of the Russian Translation Service's hostility stemmed from their having been among the first to object publicly to being required to remit a portion of their salaries to their Government, and from their having submitted requests directly to the Administration for extension of their appointments or their conversion to career appointments. Indeed, the file discloses a communication dated 5 September 1990, by the Chief of the Russian Translation Service (which, though requested by the Applicants, was not previously made available to them). It stated that "mindful of their individual efforts to change their contractual status ... [he was] maintaining [his] earlier position ... of not recommending any extensions". This statement permits an inference of retaliatory motivation on his part. There is, in addition, evidence of disparate treatment of the Applicants by the Chief of the Russian Translation Service associated with evaluations of their performance, and, in the case of the Applicant Vitkovski, an unexplained failure by the Chief of the Russian

Translation Service to prepare a performance evaluation report required by ST/AI/240/Rev.2, paragraph 4, which was of crucial importance, since it would have covered the most recent period before the expiration of Mr. Vitkovski's fixed-term appointment.

The Applicants have also produced a report by a rebuttal panel involving the Chief of the Russian Translation Service, in connection with a performance evaluation relating to a colleague, who likewise opposed the salary remission requirement of their Government, and who also made a direct request of the Administration with respect to continuation of his employment. The rebuttal panel in that case found that the Chief of the Russian Translation Service had been improperly motivated and had acted in a discriminatory fashion, a finding that is in keeping with the improper motivation charged by the Applicants here. In addition, a report by a rebuttal panel invoked by the Applicant Rylkov, in connection with his most recent performance evaluation report by the Chief of the Russian Translation Service, also appeared to perceive a relationship between "...developments in the area of career possibilities for staff members of USSR nationality, the actions taken in that regard by Mr. Rylkov and others in the Russian Translation Service and the resulting change of atmosphere in that service...".

Moreover, in a communication dated 15 October 1990, the Panel on Discrimination found, on the basis of a preliminary investigation, with respect to a complaint by the Applicant Rylkov, that there were sufficient grounds to give it cause to believe that "on a prima facie basis, the staff member has been subjected to unfair treatment in being denied a further appointment."

XVII. In the view of the Tribunal, the points discussed in the preceding paragraph in support of the Applicants' contentions were sufficient to have placed upon the Respondent the burden of investigating these matters carefully and coming forward with such evidence, if any, as it could uncover in rebuttal. It does not appear that the Respondent took any such steps, notwithstanding that the Applicants' claims of unfair treatment by the Chief of the Russian Translation Service were being asserted beginning in August and September 1990. Although under technical legal principles, the Tribunal might take

the extreme measure of regarding the absence of rebuttal as tantamount to the Applicants' contentions having been proven, it will not do so in this case, but it considers that the evidence points strongly in the direction of there having been unfair treatment. Nevertheless, the Tribunal is convinced that the Respondent acted in good faith though he misapprehended his responsibilities with respect to the evidence in support of the Applicants' contentions, and in relying entirely on the recommendations of the Joint Review Group.

XVIII. Against the background of the foregoing, the Tribunal considers that it was of paramount importance that the Joint Review Group's procedure should have met fundamental requirements of fairness and due process. All the more so because the Respondent's position (which, as indicated above, the Tribunal deems erroneous) has been simply that the Applicants failed to meet their burden of providing substantial evidence of improper motivation. Therefore, the Respondent did not directly address that issue in his answer or supplemental comments, but relied solely on a belief in good faith that the Joint Review Group had adhered to the fairness and objectivity requirements of its terms of reference in arriving at the recommendations adverse to the Applicants which were adopted by the Secretary-General.

XIX. There is not the slightest sign that the Joint Review Group gave any consideration to any issue of improper motivation or discriminatory treatment on the part of the Chief of the Russian Translation Service. On the contrary, the Joint Review Group's recommendations appear to have been heavily, if not decisively, influenced by the Chief of the Russian Translation Service's views, as an important official of the Department. Nor does it appear that the Respondent gave any thought to whether the Department of Conference Service's position as a co-equal member of the Joint Review Group might be compromised as a result of the weight that would inevitably be given to the views of the Chief of the Russian Translation Service. (Cf. Judgement No. 363, de Franchis (1986), paras. V to VIII).

XX. The Joint Review Group's procedure made no provision for informing the Applicants of what the Chief of the Russian Translation Service was asserting with regard to them, even if it was inconsistent with their performance evaluation reports or might have been based on negative material not in their files. The Joint Review Group did not insist on an updated performance evaluation report for the Applicant Vitkovski, but instead accepted the oral assertions of the Chief of the Russian Translation Service without providing any opportunity for response. Indeed, neither Applicant had any opportunity to present either their views or any supporting evidence to the Joint Review Group. These are illustrative of the seriously flawed and unfair procedures followed in these cases by the Joint Review Group, which failed to accord due process protections to the Applicants in a situation in which their future careers were at stake. It is no answer that staff representatives functioned in an advisory role with respect to the Joint Review Group and that they were given an opportunity to present and record their dissenting views. That is no substitute for the fairness, impartiality and objectivity to which the Applicants were entitled under the criteria established by the Secretary-General. Accordingly, the Tribunal concludes that owing to the irregularities it has found, and to the unfair treatment of the Applicants by the Joint Review Group, the latter's recommendations to the Secretary-General regarding them were tainted. The responsibility of the Organization is consequently engaged.

XXI. In the circumstances, the Tribunal is unable to conclude with certainty what would have been the outcome if the Joint Review Group had followed proper procedures and made, as well as explained, its recommendations on the basis of legitimate interests of the Organization, in keeping with the criteria adopted by the Secretary-General. The Tribunal therefore declines to order reinstatement of the Applicants. The Tribunal, however, finds the Applicants to have been injured by reason of the flawed procedures and irregularities, as well as by the prolonged handling of their cases by the Administration. The Tribunal fixes the amount to be paid to each of the Applicants for the injury sustained by them at 18 months of their net base salary at the rate in effect at the date of separation, and rejects all other pleas.

XXII. In addition, in view of the unfair treatment to which the Applicants were subjected, the Tribunal expresses the hope that if the Applicants seek employment with the Organization in the future in positions for which they are fully qualified, their applications will receive favourable consideration.

XXIII. Accordingly, the Tribunal orders that:

1. Each of the Applicants shall be paid 18 months of his net base salary as of the date of his separation from the Organization.

2. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Hubert THIERRY
Member

Geneva, 30 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary